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NO. _____

IN THE

Supreme Court Of The United States

October Term, 1983

LESLIE B. SCHLANSKY, ... Petitioner,

V.

UNITED STATES OF AMERICA and JOSEPH R. SANDEFUR, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ... Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROTECT AN INDIVIDUAL FROM THE PERSONAL COMPULSORY PRODUCTION OF HIS OWN DOCUMENTS, WHILE POSSESSED BY HIM, TO THE INTERNAL REVENUE SERVICE AS COMMANDED IN AN ADMINISTRATIVE SUMMONS?

PARTIES

(All named in caption.)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (No. 80-5200), whose judgment is herein sought to be reviewed, was decided and filed on June 16, 1983. Said opinion has been recommended for full-text publication, but as of this time is yet to be published. A copy of the opinion is reprinted in the Appendix hereto, *infra*, pages 1a-11a. The final Report and Recommendation of the United States Magistrate assigned the matter by the United States District Court for the Eastern District of Kentucky, decided and filed on December 10, 1981, is unreported. A copy of said Report and Recommendation is reprinted in the Appendix hereto, *infra*, pages 18a-25a. The final order of the U.S. District Court for the Eastern District of Kentucky, adopting and confirming the United States Magistrate's Report and Recommendation, was rendered and filed on February 5, 1982 and is unreported. A copy of said final order is reprinted in the Appendix hereto, *infra*, pages 16a-17a.

STATEMENT OF JURISDICTION

The Petitioner invokes the jurisdiction of this Court in this petition from the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, decided and filed June 16, 1983, pursuant to 28 U.S.C. §§1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

26 U.S.C. §7402. JURISDICTION OF DISTRICT COURTS.

(a) To Issue Orders, Processes, and Judgments.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To Enforce Summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) For Damages to United States Officers or Employees.—Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

(d) [Repealed].

(e) To Quiet Title.—The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) General Jurisdiction —

For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

26 U.S.C. §7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue law to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6427(h)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) Cross References.—

(1) Authority to issue orders, processes, and judgments.—

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) Penalties.—

For penalties applicable to violation of section 6420(e)(2), 6421(f)(2), 6427(h)(2), or 7602, see section 7210.

STATEMENT OF THE CASE

On November 8, 1979, as a part of an investigation involving Petitioner's individual income taxes for taxable years 1976 and 1977, Internal Revenue Service Special Agent Joseph R. Sandefur served an administrative summons on Petitioner requesting the appearance of Petitioner to produce the following: "A ring binder containing 8" × 12" sheets (approximate), 3 inches deep, containing cancelled checks, bank statements, invoices, receipts glued to the accountants worksheets for the years 1976 and 1977." This ring binder was subsequently determined, as a result of United States Magistrate James F. Cook's *in camera* inspection of the binder, to include:

(1) The accountants' workpapers including computations;

(2) Summaries and statements of account activities of Petitioner's bank accounts;

(3) Statements of earned interest income prepared by banks and sent to defendant;

(4) Original cancelled checks written by Petitioner's wife, Harriet Schlansky and copies of church contribution records;

(5) Copies of corporate tax returns of corporations in which Petitioner was a shareholder;

(6) Original cancelled checks written by Petitioner.

(7) Original deposit slips prepared by Petitioner.

Petitioner has refused to produce the ringbinder described in the summons of the Internal Revenue Service and its contents under the belief the compelled personal production of the demanded materials would violate his Fifth Amendment privilege against self-incrimination.

Respondents, upon Petitioner's refusal to produce the ring binder and its contents on Fifth Amendment grounds, filed the subject action on April 3, 1980 in the United States District Court for the Eastern District of Kentucky in Lexington, Kentucky and moved under authority of 26 U.S.C. §§7402(b) and 7604(a) for judicial enforcement of the Internal Revenue Service administrative summons served on Petitioner.

The action was referred to United States Magistrate James F. Cook by virtue of a *pro forma* order of the District Court dated March 1, 1978, which

designates the Magistrate to hear, determine, and make reports and recommendations in such actions. In his final Report and Recommendation the Magistrate concluded that all documents contained in the ring binder were subject to production. The Magistrate held that the accountant's workpapers, statements of Petitioner's bank accounts and summaries of account activities, statements of interest earnings prepared by banks and sent to Petitioner, original cancelled checks written by Petitioner's wife, copies of church contribution records and copies of corporate tax returns were subject to production, despite the Fifth Amendment claim, because they were not authored by the Petitioner or were not items in which he may have had a reasonable expectation of privacy. The Magistrate further held that the original cancelled checks written by the taxpayer and original deposit slips were subject to production since their preparation was voluntary and since the mere act of turning them over to the IRS did not constitute a testimonial communication that was incriminating, upon the conclusion that the documents could be authenticated by someone other than the taxpayer. The Court of Appeals for the Sixth Circuit affirmed the lower decision concluding that there was no testimonial ingredient in the *act* of personally producing the binder and its contents.

JURISDICTION OF DISTRICT COURT

Subject matter jurisdiction in this case was conferred upon the United States District Court for the Eastern District of Kentucky by 26 U.S.C. §§7402(b) and 7604(a).

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT A TAXPAYER MAY BE COMPELLED TO PERSONALLY PRODUCE DOCUMENTS IN HIS POSSESSION CONCERNING HIS PERSONAL AFFAIRS RAISES IMPORTANT QUESTIONS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION.

In this case the Government seeks to compel, by administrative summons, the production of a taxpayer's personal documents, despite the taxpayer's invocation of his Fifth Amendment privilege against self-incrimination. The Sixth Circuit Court of Appeals, relying heavily on *Fisher* v. *United States*, 425 U.S. 391 (1976), ruled that such compulsory production did not violate the privilege against self-incrimination. The issue, in the Sixth Circuit's view, was whether the act of production involved testimonial communication on the part of the individual to whom the summons was directed, or stated in other terms, whether the act of production constituted a compulsory authentication of incriminating information. Determining that the existence and location of the documents was known

and that the accuracy and identification of the documents could be proven by third parties, the Sixth Circuit reasoned that production would not involve truthtelling by the petitioner and would not provide authentication of the subject documents. Without compulsory truthtelling or authentication the Sixth Circuit surmised that there was no testimonial communication to be protected by the blanket of the Fifth Amendment. Interestingly enough, this decision was rendered after oral arguments in which the Government recognized that receipt of the subject documents, other than through personal production by Petitioner, would leave the Government, in any ensuing prosecution, with a "missing link" in its evidentiary chain.

In reaching its conclusion that the act of producing the binder and its contents would involve no testimonial ingredient, the Court of Appeals reasoned that most of the documents could be authenticated by others, and that the existence and location of the documents was foregone. Implicit in this reasoning is the idea that once the truth of a matter becomes apparent, the Fifth Amendment is not violated by requiring further confirmation by the individual against whom the inquiry is directed.

Of greater concern, however, is the failure of the Court of Appeals to recognize the extent of the compulsory authentication which its judgment will entail. Granted that most of the subject documents are

either self-authenticating or readily authenticated by others as being what they purport to be, they are not, in that state, facially incriminating. Rather, the incriminating potential of the documents becomes a reality only when they are further identified and authenticated as being the documents which Petitioner delivered to his accountants for the purpose of preparing his federal income tax returns for the years in question. It is this further step that has led the Government to insist upon production by Petitioner, as opposed to the readily available alternative of obtaining copies of the documents from third parties, and it is this further step that both makes the act of production testimonial in nature and gives rise to the danger of self-incrimination.

The decision below necessarily compels the conclusion that *Boyd* v. *United States*, 116 U.S. 618 (1886), no longer protects an individual from the compelled personal production of his own records and papers. *Boyd* stands for the proposition that compelling an individual to personally produce his own records to be used in evidence against him is, in and of itself, no different than compelling him to be a witness against himself. Applying the Sixth Circuit's analysis to cases of private papers in the hands of their owner will not ensure an individual's right "to a private enclave where he may lead a private life." *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980), quoting *Murphy* v. *Waterfront Commission*,

378 U.S. 52 (1964). Failure to properly apply the long-espoused *Boyd* doctrine in such cases "would be a step backward in what has been a long and bitterly contested battle to accord rights to persons who stand accused of crime." 632 F.2d at 1044, n. 23. Unfortunately, as shown by the decision below, this Court's recent interpretations of the scope of the Fifth Amendment privilege has left the continuing validity of the *Boyd* doctrine open to question, and as further shown below, the various Courts of Appeals addressing the question of its continuing validity have reached widely varying results. With respect to guidance for the citizen whose Fifth Amendment privilege becomes an issue because his personal papers have been subpoenaed or summoned by the Government such uncertainty is nearly as onerous as actual invalidation of the *Boyd* doctrine. Because of this, we respectfully petition this Court to resolve this issue.

II. THIS COURT'S EXPRESS RESERVATION ON THE ISSUE OF COMPELLED PRODUCTION OF PERSONAL PAPERS IN *FISHER* v. *UNITED STATES* LEAVES OPEN THE QUESTION OF *BOYD* v. *UNITED STATES*' CONTINUED VIGOR IN THE FIFTH AMENDMENT AREA.

In *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court, after noting that the privilege against self-incrimination is violated where an individual might be incriminated by his own compelled testimonial communications, found the Fifth Amendment privilege

not so violated under the particular circumstances of *Fisher* because the accountant's work papers being sought were not the taxpayer's, were not prepared by him and contained no testimonial declarations by him. *Id.* at 409, 411. The *Fisher* Court, however, expressly stated that it did not deal with the issue addressed by this petition:

> "Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here: for the papers demanded here are not his "private papers", *see Boyd* v. *United States*, 116 U.S. at 634-635, 29 L.Ed. 746, 6 S. Ct. 524."

Id. at 414.

This Court, at a much earlier date, determined that the Fifth Amendment privilege against self-incrimination extended to the compelled personal production of an individuals's own papers in *Boyd* v. *United States*, 116 U.S. 616 (1886), wherein this Court held that "compulsory production of the private books and papers . . . is compelling [the individual] to be a witness against himself within the meaning of the Fifth Amendment to the Constitution . . ." *Id.* at 634-635.

Since *Boyd*, this Court has held that the "papers" to which the privilege against self-incrimination applies exclude those of a corporation or association. *Bellis* v. *United States*, 417 U.S. 85 (1974). Further-

more, such "papers" must be in the personal, actual possession of the individual invoking the privilege. *United States* v. *White*, 322 U.S. 694 (1944); *Couch* v. *United States*, 409 U.S. 322 (1973).

Notwithstanding various limitations since the Court's decision in *Boyd*, the question still remains, post-*Fisher*, as to the continuing validity of *Boyd* when one invokes the Fifth Amendment privilege against self-incrimination under circumstances whereby a summons seeks the personal production of papers dealing with the personal affairs of the individual from whom production is sought. Seemingly, only *Boyd* can actually stand as precedent for the instant question and its validity was not negated, but rather was left open for question, in *Fisher*.

This is an important issue of national interest which we respectfully believe the Court should now address. The question has arisen repeatedly under enforcement proceedings brought by the IRS with numerous inconsistent holdings. Thus the resolution of this question is of critical importance, not only to the case at bar, but to all citizens confronting such compelled production, as well as the various public investigative bodies seeking to compel such production.

III. THERE IS A SERIOUS CONFLICT AMONG THE COURTS OF APPEAL ON THE QUESTION RAISED BY THIS CASE.

The Sixth Circuit's holding that the compelled personal production of Petitioner's personal records is not privileged under the Fifth Amendment, by use of the *Fisher* analysis, is in direct conflict with other circuits.

The Second Circuit has held that it does not read *Fisher*, as the Sixth Circuit has, to detract from the long-standing concept that the privilege against self-incrimination protects an individual from compulsory production of papers with respect to his own affairs and in his possession, even though such papers may have previously been in the hands of another. *United States* v. *Beattie*, 541 F.2d 329 (2d Cir. 1976); *In re Grand Jury Subpoena Duces Tecum, dated April 23, 1981 Witness*, 657 F.2d 5 (2d Cir. 1976).

The Ninth Circuit, in the post-*Fisher* case of the *United States* v. *Helina*, 549 F.2d 713 (9th Cir. 1977), noted the continuing validity of *Boyd*:

> "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

Id. at 716, citing *Boyd* v. *United States, supra* at 633. This is in contrast with the Sixth Circuit decision below which merely dismissed *Boyd* by saying "its approach to the right of privacy has been modified by later decisions." *See* Appendix, p. 6a.

The Third Circuit, has also concluded that the Fifth Amendment privilege applies, even after *Fisher*, to an individual's production of his personal papers in response to a subpoena. *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033 (3d Cir. 1980); *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3789 (U.S. May 2, 1983).

The Fifth Circuit, unlike the Sixth Circuit, does not seem to find the doctrines espoused under *Fisher* and *Boyd* to be mutually exclusive. The Fifth Circuit harmonized the two decisions in *United States* v. *Davis*, 636 F.2d 1028 (5th Cir. 1981), *cert. denied*, 454 U.S. 862 (1981), and then held, in conflict with the result of the Sixth Circuit:

> "[A]ny incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than a representative capacity in which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-

related or more inherently personal in content. [Footnotes omitted]."

Id. at 1043.

Because of the conflicting results arising between the circuits in the aftermath of *Fisher* we respectfully request this Court to resolve these conflicts.

IV. THE COURT OF APPEALS ERRED IN ORDERING THE TAXPAYER TO COMPLY WITH THE IRS SUMMONS.

The Sixth Circuit improperly concluded there was not testimonial communication in the *act* of producing the materials at issue despite the fact that the ultimate authentication sought by the Government, that of identifying the materials as being those given by Petitioner to his accountants for the preparation of federal income tax returns, is both testimonial in nature and potentially self-incriminating. In applying the *Fisher* analysis, whereby the act of producing the documents must be "implicit authentication" before the privilege against self-incrimination may be invoked, to the facts and circumstances of this case, the Sixth Circuit implied that the *Fisher* analysis was exclusive with respect to Fifth Amendment questions. As stated in *United States* v. *Davis*, 636 F.2d 1028 (5th Cir. 1981), *cert. denied*, 454 U.S. 562 (1981), the Fifth Amendment analysis given by *Boyd* and *Fisher* are not logically exclusive of one another. This non-exclusive viewpoint seems to be shared by the Fifth,

Second, Third and Ninth Circuits as designated in Item III of these Reasons for Granting Writ. Thus, the *Fisher* analysis and the *Boyd* analysis may co-exist, and the application of one or the other depends upon the particular facts involved. Unfortunately, in the instant case the Sixth Circuit attempted to apply *Fisher* to a situation to which the *Fisher* Court expressly avoided applying its reasoning. *Fisher*, 425 U.S. at 414. Instead, in accordance with the reasoning of the Second, Third, Fifth and Ninth Circuits, such factual situation invokes the *Boyd* analysis, and such papers are protected by the Fifth Amendment privilege against self-incrimination. Thus, this taxpayer, absent any pronouncement otherwise by this Court, should be afforded the privileges against production of his personal records which is granted in the Fifth Amendment to the Constitution of the United States.

CONCLUSION

The decision of the Sixth Circuit permits the Government to compel production of a taxpayer's own personal records, and as a result, forces the taxpayer to be the same as a witness against himself. This in essence washes away any remaining vestiges of the privilege against self-incrimination granted in the Fifth Amendment as it relates to production of one's personal papers. Clearly then, the Sixth Circuit's decision below is a most serious encroachment on one's civil liberties. The implications of this decision are serious and far reaching. It essentially destroys, for all intentions and purposes any sense of privacy that a citizen may have concerning his personal affairs.

Respectfully submitted,

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APPENDIX

APPENDIX

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Opinion of the United States Court of Appeals for the Sixth Circuit 1a-11a

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RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-5200

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and
JOSEPH R. SANDEFUR, Special Agent,
Internal Revenue Service, *Plaintiffs-Appellees,*

v.

LESLIE B. SCHLANSKY, *Defendant-Appellant.*

APPEAL from the United States District Court
for the Eastern District of Kentucky.

Decided and Filed June 16, 1983

Before: LIVELY and ENGEL, Circut Judges; and CELEBREZZE, Senior Circuit Judge.

LIVELY, Circuit Judge. This appeal concerns the validity of a taxpayer's refusal to comply with an administrative summons issued by the Internal Revenue Service which directed him to appear before an officer of the IRS and produce documents described in the summons for examination. The taxpayer appeared as directed but refused to produce the documents. His refusal was based upon the assertion that his Fifth

Amendment privilege against compulsory self-incrimination was abridged by the order to produce the documents. Following the taxpayer's refusal to comply the IRS sought and obtained from the district court an order enforcing the summons, and this appeal followed.

I.

The IRS summons was issued pursuant to section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. §7602[1] and directed the taxpayer, Leslie B. Schlansky,

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[1] **§7602. Examination of books and witnesses**

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Aug. 16, 1954, c. 736, 68A Stat. 901.

to appear and produce the following:

> A ring binder containing 8″ × 12″ sheets (approximate), 3 inches deep, containing cancelled checks, bank statements, invoices, receipts glued to the accountants worksheets for the years 1976 and 1977.

In its application for enforcement the IRS stated, by affidavit of a special agent, that it was necessary to examine the materials described in the summons "in order to properly investigate the Federal tax liability of Leslie B. Schlansky for the years 1976 and 1977." The affidavit also stated that no recommendations had been made to the Department of Justice for prosecution of the taxpayer and that the IRS had reached no conclusion respecting prosecution.

The district court referred the enforcement proceedings to a magistrate who conducted a hearing. The government called three witnesses, all of whom were employees of the accounting firm which prepared the taxpayer's 1976 and 1977 income tax returns. Together the testimony of these witnesses gave a fairly clear picture of the procedures followed by the firm in dealing with materials submitted by Mr. Schlansky and in preparing his tax returns. Mr. Schlansky was "not a typical [Form] 1040 client" in that the firm made a detailed analysis of all his financial transactions and reconciled the materials, performing bookkeeping as well as tax preparation services. Apparent-

ly all of the work was done after the close of each tax year, however. The records which Mr. Schlansky brought to the accounting firm consisted of bank statements, cancelled checks, deposit slips, general ledgers "and the like." An employee of the firm would enter and reconcile the information on "work papers" and then prepare the tax returns. The documents submitted by the taxpayer were arranged in order, and "in appropriate instances," stapled to the work papers. The accountant did not make copies of the documents sumbitted by the taxpayer. These documents, attached to the accountant's work papers, were placed in a binder or folder and returned to the taxpayer. The accounting firm also kept a "tax file" on Mr. Schlansky which contained copies of the returns and "various notes." The summons was directed only to the binder and its contents.

Following the hearing the magistrate ruled that the work papers prepared by the accounting firm were not protected by the taxpayer's privilege against compulsory self-incrimination, but that the original records produced to the tax preparer by the taxpayer were protected. The magistrate recommended that the district court order the taxpayer to deliver the binder and contents to the magistrate for *in camera* inspection and separation of the original documents from the accountant's work papers. The court accepted this recommendation and the magistrate inspected the binder and its contents. After this examination the magistrate concluded that the

materials fell into various categories, but that the taxpayer had no valid Fifth Amendment privilege as to any of them. The magistrate reaffirmed his previous conclusion that the accountant's work papers were subject to production. In addition, he found that statements of the taxpayer's bank accounts and summaries of account activities, statements of interest earnings prepared by banks and sent to the taxpayer, original cancelled checks written by taxpayer's wife, copies of church contribution records, and copies of corporate tax returns were subject to production because they "are not private papers authored by him [the taxpayer] and in which he may have had a reasonable expectation of privacy." Finally, the magistrate concluded that original cancelled checks written by the taxpayer and original deposit slips prepared by him were subject to production. Even though these materials were prepared by the taxpayer, their preparation was voluntary and the mere act of turning them over to the IRS did not constitute a testimonial communication that was incriminating. Since the existence of the documents was not in doubt and they could be authenticated by someone other than the taxpayer, the fact that the content of these preexisting documents might be incriminating did not create a privilege to withhold them. The district court adopted the magistrate's findings, conclusions and recommendations and ordered the summons enforced.

II.

A.

For many years it was settled that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime" would violate the privilege against compulsory self-incrimination. *Boyd* v. *United States*, 116 U.S. 616, 630 (1886). *Boyd* read the Fourth and Fifth Amendments as both protecting the right of privacy and held that seizure of a person's private papers to be used in evidence against him is no different from compelling him to be a witness against himself. Though *Boyd* has never been explicitly overruled, its approach to the right of privacy has been modified by later decisions. In *Fisher* v. *United States*, 425 U.S. 391 (1976), and *Andresen* v. *Maryland*, 427 U.S. 463 (1976), respectively the Supreme Court upheld a summons to a taxpayer to produce his accountant's work papers and the seizure pursuant to a warrant of private business records. The central issue is no longer the nature of the materials whose production is compelled. Instead, the question is whether their production involves testimonial communication on the part of the person to whom a summons or subpoena is directed.

B.

If the accounting firm had retained possession of the binder and its contents a summons directing the

firm to produce the documents would not have implicated the taxpayer's privilege against compulsory self-incrimination. The Fifth Amendment privilege is a personal one which adheres to the person rather than to information which might incriminate him. *Couch* v. *United States*, 409 U.S. 322 (1973). Thus the taxpayer must mave actual or constructive possession of the summonsed documents in order to invoke the privilege. Even when the taxpayer has possession of the work papers prepared by an accountant, a summons to produce such documents is ordinarily not subject to a Fifth Amendment objection. The privilege applies only where the party summonsed is compelled to make a testimonial communication that is incriminating. *Fisher* v. *United States*, 425 U.S. at 408. Though a summons to a taxpayer to produce his accountant's work papers involves compulsion, it does not require testimony by the taxpayer or compel him "to restate, repeat, or affirm the truth of the contents of the documents sought." *Id.* at 409. The fact that the documents might be incriminating on their face is irrelevant; unless some testimonial act by the taxpayer is compelled by the summons, the Fifth Amendment privilege against self-incrimination offers no basis for refusing to comply with a summons. *Id.* at 410. The magistrate correctly concluded that the taxpayer had no valid reason for refusing to produce the accountant's work papers.

In *Fisher* the Supreme Court did not reach the question whether the Fifth Amendment would shield

a taxpayer from producing his own tax records in his possession. 425 U.S. at 414. It is a question of fact in each case whether a compelled testimonial communication is involved in responding to a summons or subpoena *duces tecum*. *Id.* at 410-11. Where nothing more is involved than surrendering materials already in existence, fully identified and requiring no authentication by the taxpayer, testimony is not involved. *Id.* However, in some situations "the Fifth Amendment may protect an individual from complying with a subpoena for the production of is personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information . . . ." *Andresen* v. *Maryland*, 427 U.S. at 473-74.

The Supreme Court has identified three elements which must be present in order to avoid complying with a subpoena *duces tecum* or IRS summons on Fifth Amendment grounds. These elements are (1) compulsion, (2) testimonial communication (3) incrimination by such communication. See *United States* v. *Authement*, 607 F.2d 1129, 1131 (5th Cir. 1979) (per curiam). The fact that production of a voluntarily prepared document is compelled does not mean that any pre-existing incriminating contents are "compelled testimonial communications" within the Fifth Amendment privilege. *Matter of Grand Jury Empanelled February 14, 1978*, 603 F.2d 469, 476 (3rd Cir. 1979). The focus is on the question of whether there are testimonial aspects to the very act of produc-

ing the materials in compliance with the summons or subpoena.

We conclude that there would be no testimonial ingredient in the act of producing the binder or any of its contents. There is no serious question as to the existence or location of the documents; the summons is quite specific. Those prepared by others can be identified by the preparers. Employees of the banks can identify bank statements, cancelled checks and deposit slips which are prepared by or processed through the banks and can testify to their accuracy by comparing them to bank records. No authentication by the taxpayer would be required. The present case thus resembles *Fisher*. The existence of the binder and contents and its possession by Mr. Schlansky is not in dispute. Their production will involve no "truthtelling" by the taxpayer, *Fisher*, 425 U.S. at 411; nor will it provide authentication. Rather, responding will "express nothing more than the taxpayer's belief that the papers are those described in the [summons]." *Id.* at 413.

This case does not concern an attempt by the government to use the act of production as authentication of the documents. If the government should attempt to authenticate the binder and its contents as evidence in subsequent criminal proceedings with proof that they were produced by the taxpayer, a Fifth Amendment objection could be interposed at that time. Such proof would seek to add testimonial

value to the otherwise testimony-free act of production.

C.

We have not discussed cases from other circuits dealing with the question of what remains of *Boyd* after *Couch*, *Fisher* and *Andresen*. *E.g.*, *Matter of Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 8, 1982) (No. 82-786); *United States* v. *Davis*, 636 F.2d 1028 (5th Cir. 1981); *In re Grand Jury Proceedings*, 626 F.2d 1051 (1st Cir. 1980). Each had facts which differed from those in the present case and made the analysis somewhat more difficult. It has been suggested that *Boyd* retains its full vigor when applied to those " 'privacies of life' which are beyond the pale of legitimate government intrusion." Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 947 (1977) (quoting *Boyd*, footnote omitted). Obviously financial records which one assembles and delivers to an accountant for the purpose of preparing tax returns to not have the same degree of privacy as a personal diary. *Couch* v. *United States*, 409 U.S. at 335 ("there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return"). With respect to these less private

personal papers a majority of the Supreme Court appears to agree that the Fifth Amendment does not absolutely bar their compelled production. The inquiry must be directed to the circumstances surrounding the production itself, rather than the nature of the materials whose compelled production is sought.

Under this focus the key question is whether the compelled production involves compelled testimonial communication. The answer to this question in turn depends on whether the very act of production supplies a necessary link in the evidentiary chain. Does it confirm that which was previously unknown to the government; e.g., the existence or location of the materials? Does it supply assurance of authenticity not available to the government from sources other than the person summonsed? Though the party seeking to avoid compliance does not have to show more than is required to demonstrate that the privilege is properly claimed, he must make some showing that the act of production alone would involve an incriminating testimonial communication. *Matter of Grand Jury*, etc., 603 F.2d at 477. In the present case the taxpayer has made no showing in this regard.

The judgment of the district court is affirmed.

* * * * * * *

FILED
APR 27 1982
AT LEXINGTON
DAVIS T. McGARVEY
CLERK,
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

UNITED STATES OF AMERICA and JOSEPH B. SANDEFUR, SPECIAL AGENT, INTERNAL REVENUE SERVICE — PLAINTIFFS

V. — **ORDER** — NO. 80-52

LESLIE B. SCHLANSKY — DEFENDANT

******

The defendant having heretofore filed a Motion for an Order staying that Order of the Court entered herein on February 5, 1982, pending an appeal from said Order by the defendant to the United States Court of Appeals for the Sixth Circuit, and the Court having heard and considered the arguments of counsel in regard to said Motion, and being sufficiently advised, it is now, therefore,

ORDERED AND ADJUDGED herein as follows:

1. That the Motion of defendant for an Order staying enforcement of the Order of this Court

heretofore entered herein on February 5, 1982, be, and the same is hereby, SUSTAINED;

2. That enforcement of the Order of this Court dated February 5, 1982, be, and the same is hereby, STAYED pending disposition of the appeal by the defendant from said Order to the United States Court of Appeals for the Sixth Circuit;

3. That, pending disposition of said appeal, this Court shall retain jurisdiction over and physical possession of those books, records, and documents which are the subject of the aforesaid Order.

This 27th day of April, 1982.

/s/ Scott Reed
SCOTT REED, JUDGE, UNITED
STATES DISTRICT COURT

HAVE SEEN:

LOUIS DeFALAISE
UNITED STATES ATTORNEY

BY: /s/ Stephen M. Shumaker
ASSISTANT UNITED STATES ATTORNEY
COUNSEL FOR PLAINTIFFS

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Phyllis H. Tackett D.C.

/s/ David R. Irvin
DAVID R. IRVIN
BULLEIT, KINKEAD, IRVIN & REINHARDT
COUNSEL FOR DEFENDANT

* * * * * * * *

FILED
APR 20 1982
AT LEXINGTON
DAVIS T. McGARVEY
CLERK,
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CIVIL ACTION NO. 80-52

UNITED STATES OF AMERICA and
JOSEPH B. SANDEFUR, SPECIAL
AGENT, INTERNAL REVENUE
SERVICE PLAINTIFFS

VS. **ORDER**

LESLIE B. SCHLANSKY DEFENDANT

* *

Defendant, by and through counsel, having moved the Court for an order staying the February 5,

1982, order of the Court in the above-styled action pending appeal, and the Court having considered same and being sufficiently advised:

IT IS NOW THEREFORE ORDERED that the above motion shall come on for hearing before the undersigned Judge in the Courtroom of the U. S. Courthouse at Lexington, Kentucky, on Thursday, April 22, 1982, at the hour of 1:00 p.m.

This the 20th day of April, 1982.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Phyllis H. Tackett D.C.

* * * * * * * *

FILED FEB 5 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CIVIL ACTION NO. 80-52

UNITED STATES OF AMERICA, and
JOSEPH R. SANDEFUR, SPECIAL
AGENT, INTERNAL REVENUE
SERVICE PLAINTIFFS

VS. **ORDER**

LESLIE B. SCHLANSKY DEFENDANT

* *

The Court having considered the report of the Magistrate filed December 10, 1981, in regard to the above-styled civil action, and having made a *de novo* review of the record and the objections made to the Magistrate's Report and Recommendation in response thereto;

IT IS NOW THEREFORE ORDERED HEREIN AS FOLLOWS:

(1) That the findings of fact of the Magistrate and his conclusions of law are confirmed and adopted by the Court;

(2) That the Court having considered the objections of defendant and the response filed by plaintiffs

to the Magistrate's report and recommendation, said objections be and they are hereby OVERRULED;

(3) That the summons issued to the defendant, Leslie B. Schlansky, on November 8, 1979, directing him to produce certain documents be enforced as to all records and documents described in said summons and that the materials which have been submitted to the Court by the defendant be made available to the plaintiffs for inspection and copying.

This the 5th day of February, 1982.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Phyllis H. Tackett D.C.

* * * * * * *

FILED DEC 10 1981

RECEIVED DEC 11 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

UNITED STATES OF AMERICA and
SPECIAL AGENTS JOSEPH R.
SANDEFUR and JAMES NAEHR,
INTERNAL REVENUE SERVICE PLAINTIFFS

VS. CIVIL NO.

MAGISTRATE'S REPORT 80-52
AND RECOMMENDATION

LESLIE B. SCHLANSKY,
Rt. 9, Hume Road
Lexington, Kentucky DEFENDANT

* * * * *

This action is before the Magistrate again pursuant to the order of the presiding judge dated September 4, 1981 for a final Report and Recommendation. This Report will concern the *in camera* inspection of the materials sought in the Internal Revenue Service summons and reconsideration of the legal conclusions of the Magistrate which were included in the earlier Report which was made to the Court.

An inspection and review of all the materials contained in the folder which the defendant delivered to the Clerk on October 6, 1981 has been made. These

materials may be separated into the following categories:

(1) Accountant's workpapers including computations.

(2) Summaries/statements of account activities of defendant's bank accounts.

(3) Statements of earned interest income prepared by banks and sent to defendant.

(4) Original cancelled checks written by Harriet Schlansky and copies of church contribution records.

(5) Copies of corporate tax returns.

(6) Original cancelled checks written by Leslie Schlansky.

(7) Original deposit slips prepared by Leslie Schlansky.

In regard to the materials listed in Item No. 1, the accountant's workpapers, the Magistrate remains of the opinion that the defendant has no Fifth Amendment protection in them and so finds. With respect to the materials in Item Nos. 2 through 5, the Magistrate finds that this defendant has no Fifth Amendment privilege in these documents since they are not private papers authored by him and in which he may have had a reasonable expectation of privacy. *Fisher* v. *United States*, 425 U.S. 391 (1976).

The last two categories of documents are of a different nature than those previously considered. The

checks and deposit slips are records which were prepared by the taxpayer. These records present a more difficult problem and require a careful review of *Fisher* v. *United States, supra*, and the case authority interpreting that decision.

The first matter of concern is the view that when the government forces an individual to turn over his private papers, the act of complying with the request alone has some incriminating aspects to it. The United States Court of Appeals for the First Circuit has ruled that a defendant has a Fifth Amendment protection from producing his own documents when the act of complying is implicit authentication and reasonably thought to be incriminating testimony. *See, In Re Grand Jury Proceedings United States,* 626 F.2d 1051 (1st Cir. 1980). That court has stated that when this problem arises, the government must give the defendant limited use immunity as to the act of limited authentication which is the result of compliance. *See, United States* v. *Doe,* 628 F.2d 694 (1st Cir. 1980). The First Circuit Court of Appeals also restated the *Fisher* court's reasoning in holding that:

> "Whatever information the requested documents may contain is irrelevant because creation of the documents was not compelled by the subpoena." *In Re Grand Jury Proceedings United States supra,* at 1055.

The United States Court of Appeals for the Second Circuit has held that if the existence and location of the documents sought are not in question, the act of production did not constitute testimony within the Fifth Amendment's protective ambit. *See, United States* v. *Praetorius*, 622 F.2d 1054, 1063 (2d Cir. 1979). This appears to be the situation in the present case. There seems to be little or no basis for an issue concerning the existence and/or location of the documents being summoned. At the evidentiary hearing which was conducted by the Magistrate on August 13, 1980, the employees of defendant's accounting firm testified about the existence of the records, what they contained, and where they were located. It can reasonably be assumed that these employees can identify and authenticate the records being sought by the Internal Revenue Service. As the Supreme Court stated in *Fisher:*

> ". . . The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons 'no constitutional rights are touched. The question is not one of testimony but of surrender.' " 425 U.S., at 411.

Accordingly, the defendant would seem to have no Fifth Amendment privilege which would protect him from *turning over* the papers described in Item

Nos. 6 and 7. *Cf., In Re Grand Jury Subpoena*, 646 F.2d 963 (5th Cir. 1981).

This brings us to the crux of the controversy, that is, does the Fifth Amendment shield the defendant from complying with the summons as to the original cancelled checks and deposit slips which he prepared insofar as their content is concerned.

The proposition that the Fifth Amendment prevents compelled production of documents which might incriminate the producer stems from *Boyd* v. *United States*, 116 U.S. 616 (1886). *Boyd* held that private papers taken from a taxpayer, like other "mere evidence", could not be used against the accused over his Fourth and Fifth Amendment objections. Several of Boyd's express or implicit declarations have not withstood the test of time.

The dispositive case on this issue of compelled production of one's own handwritten private papers is again *Fisher* v. *United States, supra.* Footnote 11 of the majority opinion gives a clear understanding of what the Fifth Amendment means in these situations:

> "The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege, *Wilson* v. *United States*, 221 U.S. 361, 378 (1911). And, unless the Government has compelled the subpoenaed person to write the document, *cf. Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968), the fact that

> it was written by him is not controlling with respect to the Fifth Amendment issue. Conversations may be seized and introduced in evidence under proper safeguards, ... if not compelled. In the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel or document not authored by the producer is demanded. McCormick § 128, p. 269. 425 U.S., at 410, n. 11.

The Courts which have interpreted *Fisher* in regard to compelled production of personal records have found that three simultaneous elements must exist before a Fifth Amendment privilege will arise. They are (1) *compulsion* of a (2) *testimonial* communication that is (3) *incriminating*. *United States* v. *Authement*, 607 F.2d 1129, 1131 (5th Cir. 1979); *In the Matter of Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469, 476 (3rd Cir. 1979). If any one of these conditions is not satisfied, compelled self-incrimination within the meaning of the Fifth Amendment is not at stake. In the present case, since the documents preparation was voluntary, the fact that production was compelled by the summons does not mean that any pre-existing incriminating contents were "compelled testimonial communications." A witness who produces pre-existing documents pursuant to a summons does not testify as to all facts which the documents may reveal. *See Fisher*, *supra*, at 409-410. Since there has been no compelled testimonial communication, whether the contents may possibly have a

tendency to incriminate is not relevant. *In the Matter of Grand Jury Empanelled Feb. 14, 1978, supra*, at 477; *Accord, In Re Grand Jury Proceedings United States, supra*, at 1055. Furthermore, it may be concluded on the basis of the case authority previously discussed that cancelled checks and deposit slips are not testimonial documents in the first place. *See, United States* v. *Climbing Hill Savings Bank*, 634 F.2d 1086 (8th Cir. 1980).

In summary, it is the opinion and finding of the Magistrate that the defendant does not have a Fifth Amendment evidentiary privilege which prevents the Government from compelling him to turn over any of the documents contained in the materials which were submitted to the Court for *in camera* inspection and which were sought by the Internal Revenue Service summons. The summons issued to the defendant should be enforced because

> "(1) the fact of his possession was not of evidentiary significance or his production was not used for that evidentiary purpose, (2) their mere production did not require his testimony, and (3) they [the records] could be authenticated through some other witness." *United States* v. *Authement, supra*, at 1132.

For the foregoing reasons, it is the recommendation of the Magistrate that the summons issued to the defendant, Leslie B. Schlansky, on November 8, 1979, directing him to produce certain documents be

enforced as to all records and documents described in said summons and that the materials which have been submitted to the Court by the defendant be made available to the plaintiffs for inspection and copying.

The Clerk shall forward a copy of this Report and Recommendation to the respective parties and shall, within ten (10) days of receipt hereof, serve and file objections hereto. A party shall file objections to the Magistrate's Report and Recommendation with the District Court or else waives the right to appeal the decision of the District Court. Objections must be filed within ten (10) days of receipt of further appeal is waived. *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981).

This 10th day of December, 1981.

/s/ James F. Cook
James F. Cook, U. S. Magistrate

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Phyllis H. Tackett D. C.

* * * * * * *

FILED APR 2 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

UNITED STATES OF AMERICA and
SPECIAL AGENTS JOSEPH R.
SANDEFUR and JAMES NAEHR,
INTERNAL REVENUE
SERVICE PLAINTIFFS

VS: CIVIL

MAGISTRATE'S REPORT AND RECOMMENDATION NO. 80-52

LESLIE B. SCHLANSKY,
Rt. 9, Hume Road
Lexington, Kentucky DEFENDANT

* * * *

By order dated June 24, 1980, the defendant was directed by the Court to comply with the summons served upon him on November 8, 1979, by appearing at the Internal Revenue Service office, Lexington, Kentucky, not later than 3:30 P.M., July 15, 1980, and there produce the books, papers and records which are listed on the summons. It appears from a petition filed by the plaintiffs on July 22, 1980, together with a supporting affidavit, that Mr. Schlansky did appear as directed on July 10, 1980, but refused to produce the records listed on the summons claiming a Fifth Amendment privilege in said records.

By order of July 30, 1980, the undersigned United States Magistrate assigned this case for hearing on August 13, 1980, on the renewed petition of plaintiffs. At the hearing which was conducted on that date, the plaintiffs called three witnesses, James C. Pollard, Mary Jo Trimble and Robert McConnell. The defendant called no witnesses and the matter was taken under advisement. A transcript of the testimony was prepared at the direction of the Magistrate and is filed in the record.

From the relevant evidence which was offered, it was established that Alexander Grant and Company, Lexington, was the tax preparer of the defendant during the years in question, 1976 and 1977. All the witnesses were employees of that firm. Mr. Pollard was Managing Partner, Ms. Trimble was Administrative Assistant and Mr. McConnell was Tax Partner.

From the testimony of Mr. Pollard, it appears that the defendant brought certain records to the tax preparer, such as bank statements, cancelled checks, deposit slips, general ledgers and the like. From these, an employee of Alexander Grant would enter and reconcile this information on work paper and then prepare the tax returns. The records brought in by the defendant would be arranged in some order and, in appropriate instances, stapled to the workpapers. All these records as then put together would regularly have been returned to the defendant within three to

six months after the return was prepared. With regard to the years 1976 and 1977, these records and papers were all turned over to Mr. Schlansky or his attorney soon after Mr. Schlansky learned of an investigation which was being conducted by I.R.S. It was the further testimony of Mr. Pollard that these documents were records of the taxpayer and belonged to him.

At the time involved in preparation of the 1976 and 1977 returns, it was not the practice of Alexander Grant to make and keep a copy of these records. They were returned to the taxpayer with the admonition that they should be kept. The tax returns were prepared from these records and a copy of the returns were kept. Possibly these records were put into a binder or some type folder before being returned to the taxpayer. A "tax file" was kept by Alexander Grant in addition to the records previously referred to and it contained copies of the returns and "various notes".

According to Ms. Trimble, original documents such as W-2s, 1099s, bank statements and cancelled checks which had been provided by the taxpayer would be returned to him after preparation of the tax returns. The workpapers prepared from those documents would be put on file at Alexander Grant. This witness boxed the original documents for return to the defendant (after the I.R.S. investigation was started) but did not know what happened to them. To the best of Ms. Trimble's knowledge, summary sheets

which had been prepared by employees of Alexander Grant were also given to Mr. Schlansky.

The third witness called by the plaintiffs, Mr. McConnell, testified that he reviewed the work done at Alexander Grant on the tax return of the defendant for the year 1977. This consisted of examining the workpapers or summary sheets and the prepared returns. Afterwards, the documents were filed at the office of the tax preparer until they were called for by the defendant or his attorney sometime prior to May of 1979. The situation of Mr. Schlansky was unique to the clients of Alexander Grant in that, according to Mr. McConnell,

> "the documents that we prepared summarized his financial position and included a number of bank accounts, and there may have been as many as 12 or so. We went through a very detailed analysis of all of his financial transactions, and we essentially prepared cash receipt journals, cash disbursement journals, reconciled everything, bank transfers and this type of thing which is considerably more than we do for any of our other 1040 clients."

These efforts amounted to bookkeeping functions.

At this point, the testimony of Mr. McConnell becomes somewhat confusing. He first indicated that all these materials would then be put into a binder or sort of a notebook and set on a shelf. He further stated that in addition to the notebooks Alexander Grant

maintained a "tax file" which was also turned over to the defendant. The "tax file" did not contain these materials but did contain a copy of tax returns. The witness then testified that there may have been workpapers such as his review notes in the "tax file". It was the expectation of Mr. McConnell that the "tax file" would be returned to Alexander Grant but there was no expectation either way with regard to the notebook.

Here it is appropriate to look again at the summons which was served on the defendant and to be reminded of the records as described therein which he is called upon to produce. It reads as follows:

> "A ring binder containing 8" × 12" sheets (approximate), 3 inches deep, containing cancelled checks, bank statements, invoices, receipts glued to the accountants worksheets for the years 1976 and 1977."

Accordingly, it must be remembered that it is only the ring binder, or notebook as it was variously described by the witnesses, and its contents which constitute the subject matter of this controversy. We are not concerned with the so called "tax file".

It seems clear that the binder or notebook contains two types of materials. First, there are those records and documents which the defendant brought to the tax preparer, such as bank statements, cancelled checks, deposit slips and general ledgers. These

may be referred to as original records. Second, there are the summary sheets and the like which were prepared by employees of Alexander Grant. These may be called workpapers. It is also clear that this binder and these materials were delivered to the defendant or his attorney shortly after the I.R.S. investigation began. Notwithstanding the testimony of the witnesses which indicated that all these materials belonged to the defendant, it is the belief of the Magistrate that it is the nature of the different materials which must be examined in order to properly determine whether a Fifth Amendment privilege may be claimed in them.

The leading case on this issue is *Fisher* v. *United States*, 425 U.S. 391 (1975). The relevant language of the Court is as follows:

> "A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications . . . The accountant's workpapers are not prepared by the taxpayer, and they contain no testimonial declarations by him. Furthermore, as

> far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else. . . .
>
> ". . . In light of the records now before us, we are confident that however incriminating the contents of the accountant's workpapers might be, the act of producing them - the only thing which the taxpayer is compelled to do - would not involve testimonial self-incrimination." pps. 409-411

Also see *United States* v. *Moll*, 602 F.2d 134 (7th Cir. 1979).

Having considered the evidence in the light of *Fisher*, it is the opinion of the Magistrate that workpapers prepared by the tax preparer are not protected by the Fifth Amendment claim of the defendant. On the other hand, the original records which were produced to the tax preparer by the defendant from which the workpapers were compiled should be afforded the privilege. The problem now arises of separating the two types of records physically since they are comingled in a binder or notebook. It is respectfully suggested that the most expeditious manner of accomplishing this task is by an *in camera* review of the binder and its contents by the Magistrate. *United States* v. *Joseph*, 560 F.2d 742, 744 (6th Cir. 1977). Thereafter, before any materials are made available to the plaintiffs, a final report and

recommendation would be made by the Magistrate to the Court.

On the basis of the record herein, the Magistrate makes the following findings of fact and conclusions of law:

(1) The defendant delivered certain original records such as bank statements, cancelled checks, deposit slips and general ledgers, to his tax preparer, Alexander Grant and Company, for preparation of his 1976 and 1977 income tax returns;

(2) The tax preparer compiled workpapers from the original records for use in preparation of the defendant's tax returns for 1976 and 1977;

(3) The tax preparer placed the original records and the workpapers together in a binder or notebook which was subsequently delivered over to the defendant;

(4) The original records described in Item #1 are protected by the Fifth Amendment claim of the defendant and he should not be required to produce them;

(5) The workpapers described in Item #2 are not protected by the Fifth Amendment claim of the defendant and he should be required to produce them;

(6) It is proper for the Court to conduct an *in camera* inspection of the binders described in Item #3 and in the summons which was served upon the defendant on November 8, 1979, through the office of the

United States Magistrate and to separate the materials which are described in Item #1 and Item #2, respectively.

Accordingly, it is the recommendation of the Magistrate that the District Court order and direct the defendant, Leslie B. Schlansky, to produce and deliver to the Magistrate the binder or binders described in Item #3 and in the summons which was served upon him on November 8, 1979, at a time and date to be fixed by the Court, for *in camera* inspection of same by the Magistrate for the purpose of separating therefrom the materials described in Item #1 and Item #2, respectively, at the conclusion of which the Magistrate shall make a final report and recommendation to the Court.

The Clerk shall forward a copy of this Report and Recommendation to the respective parties who shall, within ten (10) days of receipt hereof, serve and file objections hereto. A party shall file objections to the Magistrate's Report and Recommendation with the District Court or else waives the right to appeal the decision of the District Court. Objections must be filed within ten (10) days of receipt or further appeal is waived. *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981).

This 2nd day of April, 1981.

/s/ James F. Cook
James F. Cook, U. S. Magistrate

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Phyllis H. Tackett D. C.

* * * * * * *

FILED JUN 24 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CIVIL ACTION NO. 80-52

UNITED STATES OF AMERICA and
JOSEPH R. SANDEFUR, SPECIAL
AGENT, INTERNAL REVENUE
SERVICE PLAINTIFFS

VS. **ORDER**

LESLIE B. SCHLANSKY DEFENDANT

****

The Court having considered the report of the Magistrate filed June 6, 1980, in regard to the above-styled civil action, and having made a de novo review of the file and the objections made to the Magistrate's Report and Recommendation in response thereto,

IT IS NOW THEREFORE ORDERED HEREIN AS FOLLOWS:

(1) That the findings of fact of the Magistrate and his conclusions of law are confirmed and adopted by the Court.

(2) That the defendant, Leslie B. Schlansky, is to comply with the summons served upon him on November 8, 1979, by appearing at the Internal Revenue Service office, Room 108, 1500 Leestown Road, Lexington, Kentucky, not later than 3:30 p.m., Tuesday, July 15, 1980. Defendant will then produce for examination the books, papers and records which are listed on said summons.

This the 24th day of June, 1980.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Phyllis H. Tackett D. C.

* * * * * * *

FILED JUN 06 1980

RECEIVED JUNE -9 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

UNITED STATES OF AMERICA and
JOSEPH SANDEFUR, SPECIAL
AGENT, INTERNAL REVENUE
SERVICE PLAINTIFFS

VS. CIVIL

MAGISTRATE'S REPORT AND RECOMMENDATION NO. 80-52

LESLIE B. SCHLANSKY
Rt. 9, Hume Road
Lexington, Kentucky DEFENDANT

* * * * *

The complaint in this action was filed under the authority of 26 U.S.C. § 7402(b) and § 7604(a) to judicially enforce an Internal Revenue Service summons. The case was assigned to the Magistrate by virtue of a *pro forma* order of the District Court of March 1, 1978, which designates the Magistrate to hear and determine and make reports and recommendations in such actions. Had the complaint been brought under the authority of 26 U.S.C. § 7604(b), the Magistrate would have had full authority to enter a final order; since it is not, this report must be reviewed by a

District Judge who will then make a *de novo* determination of the issue of enforceability of the summons and enter a final order. This procedure must, of course, allow for written objections to this report to be filed by the parties and reviewed also by the District Judge. Whatever the reasons of plaintiffs for their choice of statutory authority for their complaint, avoidance of delay is not one of them.

A hearing was conducted by the Magistrate on May 15, 1980. The plaintiff Sandefur was present in person and by counsel who also represented the plaintiff, United States of America. The defendant, Leslie B. Schlansky, was present in person and by counsel. Both parties announced ready. It was noted by the Court that the complaint and its attachments alleged all the elements of "good faith" in the issuance of the summons, that is: (a) a legitimate purpose for the investigation, (b) relevance of the information sought to that purpose, (c) lack of possession by the IRS of the information sought, and (d) compliance with the administrative procedures. Counsel for the defendant stated that the defendant challenged the truth of these allegations and asserted his position to be that the summons was issued for the purpose of furthering a criminal investigation rather than a purpose authorized by 26 U.S.C. § 7602.

After hearing from respective counsel, the Court placed the burden of going forward with the evidence on plaintiffs. If this was procedural error, it was com-

mitted in favor of the defendant and is not considered to be of significant consequence.

The plaintiff, Joseph R. Sandefur, then testified as a witness on the "good faith" issue raised by defense counsel. By his testimony, this factual situation was developed. Mr. Sandefur is a Special Agent with the Criminal Investigation Division (CID) of IRS and in the course of his duties was assigned to participate in an investigation of the defendant Schlansky for tax years 1976 and 1977. The purpose of the investigation was "to determine the additional liability to Mr. Schlansky's returns." The investigation has both civil and criminal aspects and is being jointly conducted by CID and the Audit Division. (Tr. 13). A civil audit is "currently going on" in the case to determine the civil liability of the taxpayer. (Tr. 26, 27).

The information sought by the summons, according to Mr. Sandefur, is necessary to determine the method in which tax returns for the years in question were prepared. The defendant's tax liabilities have not yet been determined by IRS and it is not possible to do so without the records listed on the summons. (Tr. 16, 17). The summons was issued in order to obtain these records for the purpose of determining the accuracy of the defendant's returns. (Tr. 38-43). None of the records are in possession of IRS. (Tr. 17). The summons (Govt. Ex. A) was personally served on Mr. Schlansky on November 8, 1979, and has not been

complied with. (Tr. 15, 16). There have been no recommendations for criminal prosecution in this matter. (Tr. 17).

Mr. Sandefur was the only witness called to testify during the hearing. He first testified as a witness for the plaintiffs and was cross examined by defense counsel. At that point, the Magistrate ruled, *sua sponte*, that the plaintiffs had satisfied the burden of going forward with the evidence and had made a *prima facie* showing that the necessary prerequisites for enforcement had been met. Defense counsel excepted to this ruling suggesting that it may have been premature due to it being made before plaintiffs announced closed. (Tr. 31-35). It is entirely possible that an argument could be advanced in opposition to this procedural course of conduct but, under all the circumstances, such an argument is foreseen as extremely technical and having little merit. It is also entirely possible that an understandable interest in discovery prompted the proposed "more orderly procedure" of defense counsel. (Tr. 34). In any event, this posture of the hearing did not result in any prejudice to the defendant. He was given full opportunity to present evidence in support of his challenge to the summons. The only witness he chose to call was the plaintiff, Mr. Sandefur. It is noted in passing that the identity and immediate availability of other witnesses subpoenaed by the plaintiffs were known to defense counsel. (Tr. 10).

The leading case on the issue before the Court is *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). It is there recognized that criminal and civil fraud liabilities are coterminous and IRS rarely will be found to have acted in bad faith by pursuing the former. Furthermore, those opposing enforcement of a summons bear the burden of disproving a valid civil tax determination or collection purpose by the Service. *LaSalle*, *supra*, at 316.

This burden is a heavy one and the following criteria are to be considered in deciding the enforceability of the summons: (1) the summons must be issued before the Service recommends to the Department of Justice that a criminal prosecution be taken; (2) the Service at all times must use the summons in a good faith pursuit of the Congressionally authorized purposes of Section 7602. This means that the good faith requirements of *United States* v. *Powell*, 379 U.S. 48 (1964) must be met. They are:

(a) A legitimate purpose to the investigation,

(b) Relevancy of the inquiry to that purpose,

(c) The information sought is not in possession of IRS, and

(d) The administrative steps of the Code have been followed.

(3) the Service must not abandon its civil action throughout the subsequent proceedings. The court refused to deny enforcement of the summons even

though the issuing Agent had stated that his only purpose of inquiry was related to criminal violations. This, it was said, did not prove bad faith which must be looked at from an institutional point of view.

In *United States* v. *McKay*, 608 F.2d 830 (10th Cir. 1979), a fact situation very similar to this one is found. The argument there was, "the investigation is being conducted by the Criminal Investigation Division." Still, it could not be concluded that the civil investigation was abandoned since there was evidence that this objective was also being pursued. Nor does the fact that the investigation was conducted from the outset by CID conclude the matter. This does not show that it was solely a criminal effort. See *Donaldson* v. *United States*, 400 U.S. 517 (1971).

In *Donaldson*, the court said:

> "This demonstrates that the special agent may well conduct his investigation jointly with an agent from the Audit Division; that their combined efforts are directed to both civil and criminal infractions; and that any decision to recommend prosecution comes only after the investigation is complete or is sufficiently far along to support appropriate conclusions. The fact that a full-scale tax fraud investigation is being made does not necessarily mean that prosecution ensues when tax liability becomes apparent.
>
> Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct . . . ." *supra*, at 535.

The Sixth Circuit Court of Appeals has applied the *Donaldson* standard by upholding enforcement where a summons was issued in an investigation with both civil and criminal purposes. *United States* v. *Weingarden*, 473 F.2d 454 (6th Cir. 1973). Also see *United States* v. *First National Bank of Pikeville*, 274 F.Supp. 283 (E.D. Ky. 1967) and *United States* v. *Haddad*, 527 F.2d 537 (6th Cir. 1975).

Before reaching the conclusions of this Report, one other aspect of the hearing warrants brief discussion. An objection to a question by defense counsel was made by plaintiffs' counsel on the ground that it amounted to engaging in discovery. The Magistrate allowed the question to be answered but agreed that discovery was not a proper function of the hearing and requested defense counsel not to pursue his particular inquiry further. (Tr. 25, 26). As a general rule in enforcement proceedings discovery is available only in extraordinary situations. *United States* v. *Southern Tanks, Inc.*, _____ F.2d _____ (10th Cir. 1980). Some courts have allowed very limited discovery to determine an agency's institutional posture. *United States* v. *Genser*, 582 F.2d 292 (3rd Cir. 1978). Here, the question was answered and no further controversy concerning discovery arose.

On the basis of the record in this case and the hearing which was held on May 15, 1980, the Magistrate makes the following findings of fact:

(1) The summons was issued by Special Agent Joseph R. Sandefur on November 8, 1979, and personally served on the defendant, Leslie B. Schlansky on that date; that no recommendation for criminal prosecution has been made by IRS to the Department of Justice; that the defendant has not complied with the directions of the summons;

(2) The investigation being conducted by IRS is a joint investigation between CID and the Audit Division; that its purpose is to determine if there are criminal aspects involved in the filing of the defendant's 1976 and 1977 income tax returns and to determine the civil tax liability of the defendant for those two years;

(3) That the documents and records listed on the summons are necessary to a determination of these purposes;

(4) That the documents and records listed on the summons are not in the possession of IRS;

(5) That IRS has complied with the administrative steps required by the Internal Revenue Code for issuance of the summons;

(6) That IRS is continuing to pursue its civil investigation into the tax liability of the defendant for the years in question.

It is the conclusion of the Magistrate that the plaintiffs have made a *prima facie* showing that the

necessary prerequisites for enforcement of the summons have been met. It is further the conclusion of the Magistrate that the defendant has not refuted this showing.

The Magistrate further concludes that any procedural errors committed during the course of the hearing did not deprive the defendant of any substantial rights and did not influence the outcome of said hearing.

Accordingly, it is the Recommendation of the Magistrate that the District Court order and direct the defendant, Leslie B. Schlansky, to comply with the summons which was served on him on November 8, 1979, by appearing at the Internal Revenue Service office, Room 108, 1500 Leestown Road, Lexington, Kentucky, at a time and date to be fixed by the Court and to there and then produce for examination the books, papers and records which are listed on said summons.

It is hereby ORDERED that the Clerk shall serve a copy of this Report and Recommendation on the respective parties by mailing a true copy hereof to their counsel of record by certified mail, return receipt requested. Within ten (10) days after being served, the parties may serve and file written objections hereto.

It is further ORDERED that at the conclusion of said ten (10) day period, the Clerk shall forward the entire record herein to the appropriate United States District Judge for determination and order.

This 6th day of June, 1980.

/s/ James F. Cook
James F. Cook, U. S. Magistrate

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Phyllis H. Tackett D. C.

* * * * * * *

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 83-227

IN THE

Supreme Court Of The United States

October Term, 1983

LESLIE B. SCHLANSKY, ... Petitioner,

V.

UNITED STATES OF AMERICA and JOSEPH R. SANDEFUR, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ... Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED IN PETITION FOR WRIT OF CERTIORARI

DOES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROTECT AN INDIVIDUAL FROM THE PERSONAL COMPULSORY PRODUCTION OF HIS OWN DOCUMENTS, WHILE POSSESSED BY HIM, TO THE INTERNAL REVENUE SERVICE AS COMMANDED IN AN ADMINISTRATIVE SUMMONS?

AUTHORITY FOR AND PURPOSE OF SUPPLEMENTAL BRIEF

This supplemental brief is filed pursuant to Supreme Court Rule 22.6 for the purpose of calling attention to a new case not available at the time of the filing of the petition for writ of certiorari.

DISCUSSION OF SUPPLEMENTAL CASE

The new case to which Petitioner would direct the attention of the Court is *United States* v. *Porter*, _____ F.2d _____, 52 AFTR 2d 83-5511 (7th Cir., decided July 6, 1983; published August 4, 1983).

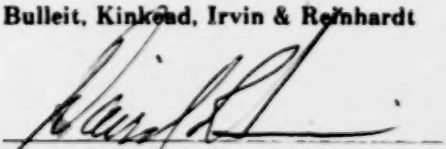
The operative facts involved in *Porter* are substantially identical to those of the instant case. The taxpayer, one Beligratis, was commanded by an Internal Revenue Service administrative summons to produce his own business records, including cancelled checks and deposit tickets, all as in the instant case. The United States Court of Appeals for the Seventh Circuit reached a conclusion diametrically opposed to the ruling of the Sixth Circuit below, and held that the act of production of Beligratis' cancelled checks and deposit slips results in compelled testimony protected by the Fifth Amendment. Thus, the conflict among the Courts of Appeal is now even more direct and exhibits even greater confusion in the aftermath of *Fisher* v. *United States*, 425 U.S. 391 (1976) than as described in the petition for writ of certiorari.

CONCLUSION

Just as the Fifth Amendment privilege against compelled self-incrimination is too fundamental that its scope and availability should rest upon something as arbitrary as winning the race for certiorari [see *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327 (3d Cir., 1982), *cert. granted sub nom. United States* v. *Doe*, 82-786 April 22, 1983, 51 U.S.L.W. 3789 (U.S. May 2, 1983)], so should its scope and availability not rest upon something as arbitrary as whether the taxpayer resides in Chicago, Illinois or Lexington, Kentucky. Accordingly, Petitioner respectfully prays that the subject petition for writ of certiorari, as supplemented by this brief, be granted.

Respectfully submitted,

Bulleit, Kinkead, Irvin & Reinhardt



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No. 83-227

In the Supreme Court of the United States

OCTOBER TERM, 1983

LESLIE B. SCHLANSKY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

REX E. LEE
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U.S. Department of Justice
Office of the Solicitor General

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November 10, 1983

Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Leslie B. Schlansky v. United States, No. 83-227

Dear Mr. Stevas:

On page two of the memorandum we filed in reponse to the petition for a writ of certiorari in the above case, we stated that petitioner first raised a Fifth Amendment claim when he appeared before the IRS special agent after the district court adopted the magistrate's recommendation and ordered the summons enforced. Counsel for petitioner has brought to our attention that the Fifth Amendment privilege was discussed during the prior proceedings before the magistrate. The magistrate, however, apparently did not understand that the Fifth Amendment privilege was being asserted because he did not rule on that issue. We bring this to the Court's attention for the sake of accuracy, although it is immaterial to the disposition suggested in our response.

Sincerely yours,

Rex E. Lee
Solicitor General

cc: David R. Irvin, Esq.
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TABLE OF AUTHORITIES

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Constitution:

U.S. Const. Amend. V 3

In the Supreme Court of the United States

OCTOBER TERM, 1983

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Petitioner seeks review of the decision below enforcing an Internal Revenue summons requiring him to produce a ring binder containing his records and an accountant's workpapers used in the preparation of petitioner's 1976 and 1977 federal income tax returns. Holding that petitioner's privilege against compelled self-incrimination did not preclude production of the records, the courts below directed respondent to comply with the summons.

1. Petitioner employed a certified public accounting firm to prepare his federal income tax returns for the years 1976 and 1977. He provided that firm with his cancelled checks, bank statements, and other records, and the firm prepared, in workpaper form, journals and a ledger for petitioner's business activities, as well as petitioner's federal income tax returns. The workpapers prepared by the firm, together with petitioner's records, were placed in a ring binder for

retention by the firm (Pet. App. 3a-4a). After the Internal Revenue Service commenced its investigation of petitioner's 1976 and 1977 tax returns, petitioner acquired the ring binder, and the special agent in charge of the investigation summoned it from petitioner. Upon petitioner's refusal to produce the ring binder, this action was commenced to compel its production.

Petitioner resisted enforcement of the summons on the ground that the summons had been issued solely for the purpose of assisting a criminal investigation. The district court followed the disposition recommended by the magistrate to whom the case had been referred and entered an order directing petitioner to obey the summons (Pet. App. 35a-46a). No appeal was taken from that order. Petitioner appeared before the agent and, for the first time, asserted that the records sought were protected by his privilege against compelled self-incrimination. In the proceeding subsequently brought to enforce the court's order, employees of the accounting firm described the ring binder and its contents (*id.* at 27a-30a), and petitioner submitted the ring binder for in camera inspection by the court. That inspection disclosed that the ring binder contained several categories of documents: (1) accountant's workpapers, (2) summaries of petitioner's bank account activity, (3) bank statements of interest earned by petitioner's accounts, (4) cancelled checks written by petitioner's wife and copies of church contribution records, (5) copies of corporate tax returns for corporations in which petitioner held an interest, (6) petitioner's cancelled checks, and (7) deposit slips prepared by petitioner (*id.* at 19a). The district court (*id.* at 16a-17a) adopted the magistrate's conclusion that under *Fisher* v. *United States*, 425 U.S. 391 (1976), the contents of the ring binder were not protected by petitioner's privilege against self-incrimination. The magistrate determined that petitioner had no privilege with respect to the first five

items listed above, since they had not been prepared by him and were not his private papers (Pet. App. 19a). The magistrate also found that the act of producing the remaining documents did not constitute testimonial self-incrimination (*id.* at 19a-24a).

2. The court of appeals affirmed (Pet. App. 1a-11a). Noting that under *Fisher* the Fifth Amendment privilege applies only when the party claiming its protection is compelled to make a testimonial communication that is incriminating, the court concluded that there "would be no testimonial ingredient in the act of producing the binder or any of its contents" (Pet. App. at 9a). The court found that there was no serious question as to existence and location of the papers at issue and that the government was not attempting to use the act of production to authenticate them (*id.* at 9a-10a). The court recognized that there is a conflict among the circuits concerning whether the Fifth Amendment privilege protects the contents of "private papers." But the court found it unnecessary to reach that issue, because the records summoned here were financial records and petitioner conceded at oral argument that they are not private papers (*id.* at 10a-11a).

3. This case presents several questions closely related to those before this Court in *United States* v. *Doe*, cert. granted, No. 82-786 (May 2, 1983),[1] including whether the contents of an individual's preexisting business records are protected by the Fifth Amendment privilege and whether the act of producing such records amounts to testimonial self-incrimination where there is no serious question as to the existence or location of the documents and the government is not attempting to use the fact of production as

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[1]We are serving petitioner with a copy of our brief in *Doe*.

authentication of the documents.[2] In these circumstances it would be appropriate to hold this petition pending the Court's decision in *Doe*.

It is therefore respectfully submitted that the petition should be held for disposition in light of the decision in *United States* v. *Doe*, No. 82-786.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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[2]While the issues presented by the two cases are similar, the cases differ in many particulars, including the following: the types of documents sought (compare Pet. App. 19a with *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 328 n.2 (3d Cir. 1982), cert. granted *sub nom. United States* v. *Doe*, No. 82-786 (May 2, 1983)); ownership of certain documents (compare Pet. App. 19a, 31a with 680 F.2d at 334); authorship of certain documents (compare Pet. App. 19a-20a with 680 F.2d at 335); evidence concerning the existence and possession of the documents (compare Pet. App. 9a with the government's brief in *Doe* (at 31-32)); the available means of authenticating the documents without the participation of the individual upon whom the subpoena or summons was served (compare Pet. App. 9a with the government's brief in *Doe* (at 33-38)); and the procedure employed to ensure that any testimonial self-incrimination inherent in the act of production would not be used against the individual (compare Pet. App. 9a-10a with 680 F.2d at 337 and the government's brief in *Doe* (at 43-49)).

DOJ-1983-09